

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 SUNIL REPAKA,
11
12 v. Plaintiff/Petitioner,
13 RAND BEERS, Acting Secretary of
14 Homeland Security,
15 ALEJANDRO MAYORKAS, Director
16 of United States Citizenship and
17 Immigration Services, and
18 MARILYN WILES, Director, USCIS
19 Nebraska Service Center,
20
21 Defendants.

Case No. 13-cv-05 BTM-RBB

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

22 The parties have filed cross-motions for summary judgment. For the reasons set
23 forth below, Plaintiff's motion is **DENIED** and Defendants' motion is **GRANTED**.
24

25 **I. BACKGROUND**

26 **A. Legal Framework: Exceptional Ability Visas**

27 The Immigration and Nationality Act ("INA"), as amended, provides for the
28 issuance of visas to aliens "who are members of the professions holding advanced
degrees . . . who because of their exceptional ability in the sciences, arts, or

1 business, will substantially benefit prospectively the national economy.” 8 U.S.C. §
 2 1153(b)(2)(B)(i). An applicant for such a visa ordinarily must be sponsored by an
 3 American employer, though the INA provides the Attorney General¹ with discretion
 4 to waive the job offer requirement if he “deems it to be in the national interest.” Id.
 5 Authorized agency officials may exercise that discretion within the bounds of the
 6 INA, applicable regulations, and governing decisions so long as their professional
 7 judgment is informed, reached, and announced consistent with those laws. Recent
 8 Past Pres. Network v. Latschar, 701 F. Supp. 2d 49, 61 (D.D.C. 2010).

9 “Exceptional ability” is defined as “a degree of expertise significantly above
 10 that ordinarily encountered in the sciences, arts, or business.” 8 C.F.R. 204.5(k)(2).
 11 Neither the INA, nor regulations promulgated thereunder, define “national interest.”
 12 The Board of Immigration Appeals evaluates requests for a national interest waiver
 13 as follows: The petitioner must show (1) that he seeks employment in an area of
 14 substantial intrinsic merit, (2) that the proposed benefit will be national in scope,
 15 and (3) requiring a labor certification would negatively affect the national interest.
 16 Matter of New York State Dep’t of Trans., 22 I&N Dec. 215, 217-18, 1998 BIA
 17 LEXIS 26 (BIA Aug. 7, 1998) (“NYDOT”) (“Stated another way, the petitioner,
 18 whether the U.S. employer or the alien, must establish that the alien will serve the
 19 national interest to a substantially greater degree than would an available U.S.
 20 worker having the same minimum qualifications.”). NYDOT has been designated
 21 as “precedent” with respect to national interest waiver applications. See A.R. 568.
 22 See also Talwar v. INS, 2001 U.S. Dist. LEXIS 9248, *18 (S.D.N.Y. July 9, 2001).
 23 USCIS continues to apply NYDOT, as evidenced by the RFE (A.R. 453) and its
 24 decision (A.R. 559). The Court defers to this interpretation of “national interest.”

25
 26 ¹ The Homeland Security Act of 2002, P.L. 107-296 §§ 441, 451-56, transferred
 27 this function to the Department of Homeland Security. The visa application *sub judice*
 28 falls under the purview of the United States Citizenship and Immigration Service
 (“USCIS”).

1 See Chevron USA, Inc. V. Natural Resources Defense Council, 467 U.S. 837, 842-
 2 43 (1994); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (deferring to a Board
 3 of Immigration Appeals order). See also Montana Wilderness Ass’n v. Connell,
 4 725 F.3d 988, 994 (9th Cir. 2013). The waiver denial is reviewable under the
 5 Administrative Procedures Act (“APA”) and 28 U.S.C. § 1331. Mikhailik v.
 6 Ashcroft, Civ. No. 04-0904, 2004 US Dist. LEXIS 20379, *13-16, 21 2004 WL
 7 2217511, *2 (N.D.Cal. Oct. 1, 2004) (waiver decision is not a matter of unfettered
 8 discretion under 5 U.S.C. § 701(a)(2) because the designation of NYDOT as
 9 precedent constitutes a settled course of adjudication “entitled to substantial
 10 deference”) (citations omitted). See also Spencer Enters. V. United States, 345 F.3d
 11 683, 688 (9th Cir. 2003) (“Even where statutory language grants an agency
 12 unfettered discretion, its decision may nonetheless be reviewed if regulations or
 13 agency practice provide a meaningful standard by which this court may review its
 14 exercise of discretion.”); O’Neill v. Cook, 828 F. Supp. 2d 731, 736 (D. Del. 2011).

15 **B. Facts**

16 On January 25, 2010, Mr. Repaka filed an employment based immigrant
 17 petition (“Form I-140”) pursuant to INA § 203(b)(2), requesting classification as an
 18 alien of exceptional ability. A.R. 1. Mr. Repaka sought a waiver of the labor
 19 certification requirement, as his petition was not sponsored by an employer. In
 20 support of his waiver request, he submitted eighteen exhibits. On March 29, 2010,
 21 USCIS requested additional evidence regarding Repaka’s qualifications,
 22 specifically requesting evidence that waiver would be in the national, rather than
 23 merely local, interest. A.R. 452-53 (requesting evidence of his “ability to serve the
 24 national interest to a substantially greater extent than the majority of [his] peers”
 25 and his “influence on [his] field of employment as a whole.”). Mr. Repaka timely
 26 filed seven additional exhibits in response. A.R. 2, 454-537.

1 On October 18, 2010, USCIS denied Mr. Repaka's waiver request, finding
 2 that he is a "competent engineer whose skills and abilities are of value to his
 3 employer" but "the record does not show that a job offer waiver based on the
 4 national interest is warranted." A.R. 538-41. Mr. Repaka appealed to the USCIS
 5 Administrative Appeals Office ("AAO") on November 18, 2010. A.R. 544-46. On
 6 appeal, he provided additional evidence, including a list of 27 papers purportedly
 7 citing his work. A.R. 547-53. The AAO affirmed the waiver denial on January 18,
 8 2012. A.R. 557-68.

10 II. STANDARD OF REVIEW

11 In actions brought under the Administrative Procedures Act ("APA"),
 12 summary judgment serves as an avenue for deciding whether a final agency action
 13 is adequately supported by the administrative record. Northwest Motorcycle Ass'n
 14 v. U.S. Dep't Agric., 18 F.3d 1468, 1471-72 (9th Cir. 1994). For jurisdiction under
 15 the APA, the agency action at issue "must be final, it must adversely affect the party
 16 seeking review, and it must be non-discretionary." Pinho v. Gonzales, 432 F.3d
 17 193, 200 (3d Cir. 2005). Under the APA, the Court may set aside an agency's final
 18 decision only upon a finding that it was "arbitrary, capricious, an abuse of
 19 discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). An
 20 agency action is arbitrary or capricious if the agency fails to "examine the relevant
 21 data and articulate a satisfactory explanation for its action including a rational
 22 connection between the facts found and the choice made." Motor Vehicle Mfrs.
 23 Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (internal
 24 citations and quotations omitted).

25 The Court's review is based on the administrative record that was before the
 26 agency decision makers at the time they made their decision. Citizens to Preserve
 27 Overton Park v. Volpe, 401 U.S. 402, 420 (1971). The Court reviews the whole
 28

1 record, or those parts of it cited by a party, for substantial evidence. See Herrera v.
2 USCIS, 571 F.3d 881, 885 (9th Cir. 2009). It will not disturb the agency’s final
3 decision “unless the evidence presented would *compel* a reasonable finder of fact to
4 reach a contrary result.” See Herrera v. USCIS, 571 F.3d 881, 885 (9th Cir. 2009).
5 Id. “Review under this standard is to be searching and careful, but remains narrow,
6 and a court is not to substitute its judgment for that of the agency. . . . [especially
7 where] the challenged decision implicates substantial agency expertise.” Friends of
8 Clearwater v. Dombek, 222 F.3d 552, 556 (9th Cir. 2000) (citations omitted). Thus,
9 to prevail, Mr. Repaka must establish that the decision denying his waiver request
10 was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with
11 the law.

12 13 **III. DISCUSSION**

14 It bears emphasizing that even aliens who establish exceptional ability are
15 ordinarily subject to the job offer requirement. Thus, the petitioner must satisfy an
16 even higher burden. In other words, it does not suffice to be “good.” Indeed, it
17 does not suffice to be “exceptional.” By the plain language of the statute, for the
18 agency to even have discretion to grant a waiver, one must demonstrate such
19 exceptional talent that his presence is in the national interest. According to Mr.
20 Repaka’s application, “[w]hat makes [him] unique is that he has a background in
21 using remote sensed imagery in graphic information systems.” USCIS found that
22 Mr. Repaka is a competent engineer in a field (transportation engineering with an
23 emphasis on remote sensing, hazard mapping, and floodplain management) of
24 substantial intrinsic merit. USCIS also acknowledged the national benefit of Mr.
25 Repaka’s occupation. A.R. 539. The Court thus assumes that expertise in these
26 fields is of national importance. NYDOT (bridge safety engineering expert could
27 provide service of national import). But his waiver request was denied because he
28

1 had not demonstrated such extraordinary ability that a waiver was in the national
2 interest.

3 Pointing to his research and reference letters, Mr. Repaka argues that the
4 AAO's decision is arbitrary, capricious, and contrary to law. Specifically, he (1)
5 complains that USCIS did not provide sufficient opportunity to present clarifying
6 information, and (2) attacks the analysis of his past achievements. (Pl.'s Mot. 4-5.)

7 **A. The Request for Additional Evidence**

8 According to Mr. Repaka, USCIS requires a waiver applicant to "read minds"
9 because its March 28, 2010 request for additional evidence ("RFE") was too
10 general. (Pl.'s Reply 2.) The Court disagrees. The RFE merely offered a second
11 bite at the apple. It stated that he had satisfied the first prong of the analysis, i.e.,
12 showing his field to be one of substantial intrinsic merit. But it also explained that
13 the initial waiver request was not supported by enough evidence that his work is in
14 the national, as opposed to local, interest. Moreover, it specifically explained that
15 the agency seeks evidence of his "influence on your field of employment as a
16 whole" and that "your abilities are greater in some capacity to the majority of your
17 peers." A.R. 453. The Court finds no deficiency in the RFE, in terms of adequacy
18 of notice or otherwise.

19 **B. USCIS Analysis**

20 Mr. Repaka argues that Defendants misunderstood the significance of his
21 credentials, ignored his supplemental list of citations, A.R. 547-554, and failed to
22 give proper weight to his reference letters. Again, the Court disagrees.

23 1. **Professional Credentials**

24 The petitioner alone bears the burden of proof. 8 U.S.C. § 1361. See also
25 Matter of Treasure Craft of Cal., 14 I&N Dec. 190 (R.C. 1972). Commensurate
26 with that burden is responsibility for explaining the significance of proffered
27 evidence. The significance of membership in, e.g., the American Society of Civil
28

1 Engineers (“ASCE”), or of any awards, accolades, or certifications, is for him to put
2 in context and explain in a meaningful way. As the AAO noted, “[t]he unsupported
3 assertions of counsel do not constitute evidence.” A.R. 560. Yet that is what Mr.
4 Repaka’s appeal rests upon. He does not show that USCIS failed to give sufficient
5 weight to his membership in, e.g., the ASCE. Even assuming *arguendo* that fewer
6 than nine percent of ASCE members obtain full “Member” status, as he claims,
7 there is no reason to believe that would render such Members “exceptional” for
8 purposes of 8 C.F.R. § 204.5(k)(2). USCIS likewise explained that a state license
9 does not demonstrate exceptional ability, since “every engineer in California passed
10 the examinations as [Mr. Repaka] did.” A.R. 561. The petitioner has shown no
11 error in the consideration of his credentials, awards, or affiliations in determining
12 the record lacked sufficient evidence of exceptional ability.

13 2. Publications & Citations

14 Although publication is not a necessary condition for a waiver, publications
15 and presentations form a significant part of Mr. Repaka’s case. The record indicates
16 that Mr. Repaka has no published journal articles (though one of his works was
17 cited in a 2006 journal article), and two of his articles were published in conference
18 proceedings, most recently in 2004. A.R. 568. USCIS explained that it is not
19 enough to show that the petitioner plays an important role in his field, because
20 qualified U.S. workers may perform the same role. A.R. 540. Additionally, if Mr.
21 Repaka “no longer conducts research for publication or presentation, his past history
22 of such work offers no prospective benefit to the United States.” A.R. 568.

23 Assuming that the Google Scholar printout provided by Mr. Repaka is
24 accurate, at least one of his works was cited as recently as 2010. A.R. 553. Yet
25 USCIS concluded that Mr. Repaka’s published research has a “very minimal
26 citation record,” that he has not demonstrated a level of interest in his work that
27 distinguishes him from his peers, and that his research was not “cutting edge.” Id.
28

1 The AAO agreed that academic citations to student research says little about the
2 importance of his subsequent professional endeavors, and found that the citations do
3 not “demonstrate an unusual level of impact or influence in his field.” A.R. 561.
4 Citations alone establish little, as they provide no indication as to what his works
5 were cited for. Thus, Mr. Repaka points to articles citing a 2004 conference paper
6 he coauthored entitled *Comparing Spectral and Object Based Approaches for*
7 *Classification and Transportation Feature Extraction from High Resolution*
8 *Multispectral Imagery*. A.R. 168, 189, 201. A supporting letter from Rodrigo A. A.
9 Nobrega, Ph.D. of Mississippi State University’s Geosystems Research Institute
10 explains that Mr. Repaka’s study explored the extraction of transportation features
11 from multispectral imagery from two satellites. A.R. 234. “The benefit of this
12 method is that it saves time and allows for accurate and speedy classification and in
13 turn helps with the planning phase of road construction, railroad relocation and
14 other major civil transportation projects. Id. That is no doubt helpful, but the cited
15 pieces do not indicate that Mr. Repaka was or is vital to the development of any
16 particular application or technique. Consequently, the record lacks sufficient
17 evidence to discern the prospective benefits of his work or otherwise support an
18 alternative result here. The Court therefore finds no deficiency in the evaluation of
19 citations to Plaintiff’s work.

20 3. Reference Letters

21 Mr. Repaka also provided several letters of recommendation from previous
22 employers and others that describe his contributions to specific projects. The letters
23 suggest that he was instrumental to a floodplain mapping initiative in Mississippi
24 (A.R. 562-63, 565) and “Trade Corridor Improvement” efforts in California (A.R.
25 563-65). USCIS found these letters insufficient to establish that he stands apart
26 from his colleagues to such a degree as to merit a waiver. The AAO considered and
27 discussed the letters, finding them insufficient, when combined with all the
28

1 evidence, to establish that a waiver was in the national interest. A.R. 561-66. Mr.
 2 Repaka demonstrates nothing to the contrary. For example, according to one letter,
 3 he saved the California Department of Transportation \$13 million. The AAO
 4 determined, based on record evidence, that those savings were not attributable to
 5 any particular skill wielded by Mr. Repaka, but instead to waivers obtained based on
 6 exceptions to advisory design standards. A.R. 566.

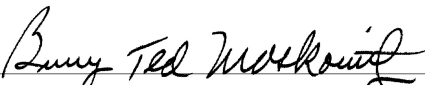
7 The supporting letters leave little doubt that Mr. Repaka has expertise in
 8 obtaining useful data from multispectral imaging and other remote sensing
 9 techniques. See, e.g., A.R. 234-35. But, as discussed above, that is insufficient to
 10 satisfy the heavy burden applicable here. Mr. Repaka reveals no errors in the
 11 AAO's analysis of his reference letters, and the Court finds no reason to disturb the
 12 AAO decision.

13 14 **IV. CONCLUSION**

15 USCIS accepted all of Plaintiff's evidence and provided him with an
 16 opportunity to supplement it. The petitioner has shown nothing arbitrary,
 17 capricious, or otherwise improper in the analysis of that evidence. Indeed, he has
 18 failed to establish that he was eligible for a waiver, let alone that the agency abused
 19 its discretion in declining to grant one. The Court accordingly finds that, at both the
 20 initial and appellate level, USCIS provided a thorough analysis and explanation
 21 consistent with the applicable law.

22 For the reasons stated, the Court **DENIES** Plaintiff's motion for summary
 23 judgment and **GRANTS** Defendants' motion for summary judgment. The Clerk of
 24 Court shall enter judgment accordingly.

25
26 DATED: January 6, 2014


 BARRY TED MOSKOWITZ
 Chief Judge
 United States District Court